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In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS BRIEF OF INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES IN SUPPORT OF PETITIONERS

WILLIAM R. RAPSON
(*Counsel of Record*)
MARY VIVIANO LAITOS
KEITH D. TOOLEY
WELBORN SULLIVAN MECK & TOOLEY P.C.
1775 Sherman, Suite 1800
Denver, Colorado 80203
(303) 830-2500

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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AMICUS CURIAE BRIEF OF THE INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES[1]

IPAMS respectfully submits this *amicus curiae* brief in support of Petitioners, Amoco Production Company, and the class it represents. Pursuant to Supreme Court Rule 37.2, this *amicus curiae* brief is filed with the written consent of the parties.[2]

INTEREST OF THE *AMICUS CURIAE*

IPAMS is a regional trade association representing over 1000 companies and individuals involved in the exploration, development, and production of crude oil and natural gas in the Rocky Mountains and Western United States. IPAMS members are generally smaller companies and "mom and pop" type entities, who operate under close economic margins and for whom the loss of a single project may be devastating. Ownership of natural gas in subsurface coal formations is of critical importance to IPAMS members, many of whom are actively involved in projects targeting this gas.

SUMMARY OF ARGUMENT

The members of IPAMS respectfully entreat this Court to grant the petition for review of the court of

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[1] This brief is authored solely by counsel for *Amicus Curiae* Independent Petroleum Association of Mountain States ("IPAMS").

[2] Copies of the consent letters were concurrently filed with the Clerk of the Court.

appeals' decision, because the decision completely alters the basis upon which coalbed methane gas has been developed for the last twenty years, causing great hardship and economic uncertainty. The appellate court's unprecedented construction of the reservation of "coal" in the Coal Lands Acts of 1909 and 1910, 30 U.S.C. §§ 81, 83-85 ("the Acts"), to include natural gas in coalbeds, ignores the plain meaning of that term, and has far reaching and very negative consequences for thousands of private property owners, oil and gas companies, royalty owners and state and local governments.

ARGUMENT

I. THE CONSEQUENCES OF THE COURT OF APPEALS' RULING ARE DEVASTATING TO PROPERTY OWNERS, PRODUCERS AND STATE AND LOCAL GOVERNMENTS THROUGHOUT THE WESTERN UNITED STATES.

In the decision, the court of appeals rejects the long-standing statutory construction of the U.S. Department of Interior ("DOI"), that under the Acts, natural gas in coalbeds was conveyed to homesteaders the same as gas in any other subsurface formation. *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 I.D. 538 (1981) ("Solicitor's Opinion"). By overturning the Solicitor's Opinion, the court of appeals fashioned a decision that not only bestows a windfall on the Southern Ute Indian Tribe, but also creates enormous harm and displacement of property ownership interests for citizens far beyond the Tribe's Reservation in southwestern Colorado.

This case is not a question of Indian law. Rather, it is an issue of title to natural gas located in coalbeds and whether such gas was conveyed or reserved under the Acts. The DOI seemingly resolved this question almost twenty years ago in an opinion that producers were required to follow in order to develop these gas resources. Under the Acts, there are two possible owners of title to the gas still located in coalbeds: (1) the homestead patentees and their successors who were conveyed the surface and all other minerals, including oil and natural gas; or (2) the U.S. government and its successors who reserved "coal". Once the government, through the Solicitor's Opinion, determined ownership of this gas, producers could proceed to obtain leases in order to develop it. And so they have, with an estimated 7000 coalbed methane gas wells completed through 1996, proving up billions of dollars of reserves of natural gas. *See* Potential Gas Committee, Colorado School of Mines, *Potential Supply of Natural Gas in the United States* (1997), p. 11 and Table 2. The majority of this gas has not yet been found, however, and significant capital resources are being directed towards its recovery. Experts estimate total reserves in western basins to be over 132 trillion cubic feet. *Id.* This case, which completely reverses the basis upon which coalbed gas has been developed, has stopped exploration activity in its tracks and saddled producers with real economic calamity. Now, if title to the lands believed to contain coal gas originates under the Acts, ownership of that resource is no longer definitively known.

A. Marketable Title Is No Longer Obtainable For Gas Underlying 20 Million Acres of Western Lands.

Pursuant to the Acts, more than 16 million acres of public lands have been conveyed by patents from the

Federal Government to private parties. DOI *Public Land Statistics* 54-55 (1997). Patents issued under the Acts cover lands in 17 states, with the majority located in the coal rich Rocky Mountain Region. *Id.* Typically no more than 160 acres each, these patents were received by more than 100,000 private parties whose heirs now number several times that figure. To date, companies have secured title for drilling and producing gas from coalbeds, by leasing rights to explore for oil and gas from the patent holder chain of title. Producers made these investment decisions in reliance upon the plain meaning of the word "coal", oil and gas practice and the Solicitor's Opinion. Under the appellate court's analysis however, "coal" includes this gas and thousands of producers are now deemed to have leased from the wrong lessor. An additional 4 million acres of property rights conveyed under the 1914 Act, 30 U.S.C. § 121, wherein the Federal Government reserved only "oil and gas", are also impacted. Under the decision, federal oil and gas leases issued pursuant to this reservation, would no longer authorize recovery of gas from coal formations. The loss of 20 million acres of property interests is catastrophic for past and pending mineral development.

The court of appeals' decision has destroyed, or at the very least clouded, title to all of the natural gas sourced in coal underlying 20 million acres of land. As a result, exploration and development of this resource cannot continue. A fundamental pre-requisite to any exploration program is acquiring marketable title to the targeted resource. Marketable title is one which is "free from reasonable doubt" and will not expose the party who

holds it to the "hazards of litigation" or duplicative payments. Lewis G. Mosburg Jr., *Handbook on Petroleum Land Titles* § 104, pp. 5-6 (1981); *Wilson v. Elliott*, 589 N.E.2d 259, 261 (Ind. App. 1992); *Knight v. Devonshire Co.*, 736 P.2d 1223, 1225 (Colo. App. 1986). The marketable title standard is used throughout the industry by operators and pipeline purchasers as the basis for allocating and distributing production revenues and royalties.[3] Mineral title examiners require this standard to ensure lawful operations, free from claims of trespass or third party ownership. Likewise, energy lenders base capitalization and financing decisions on the amount of reserves that a company owns. To collateralize reserves, marketable title must again be adequately demonstrated. The court of appeals' decision has raised the spectre that a company's investment in coal gas assets may now be lost.

The economic consequences for property owners who entered into leases for oil and gas development are catastrophic. These lessors (and their lessees), have effectively been disenfranchised from their property. For many of these individuals, the loss of monthly income from royalty checks is devastating. Calculation of these losses is compounded by the ripple effects occurring throughout the rural economies where this gas is located

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[3] *See, e.g., Hull v. Sun Refining and Marketing Co.*, 789 P.2d 1272, 1277 (Okla.1989) (suspension of royalty payments proper where marketable title in doubt); 33 Rocky Mtn. Min. L. Inst. 17, *First Purchaser Suspense Accounts* § 17.04[2][a] (1988) (suspending proceeds from production should always be required "when the mineral fee or leasehold title is clouded of record in such a manner that the first purchaser might be placed at risk for double or improper payments.")

and whose citizens depend upon oil and gas revenues and severance taxes to fund schools, roads and other public works.

Numerous successful projects completed far outside the Southern Ute Reservation in areas such as the Powder River Basin of Wyoming and the Raton Basin of Southern Colorado, were done on the basis of leasing decisions in accordance with the Solicitor's Opinion. Now producers find themselves in an untenable situation. Past projects have been rendered unsound, no matter how successful, by the possibility of third party claims of trespass and disgorgement of previously distributed revenues. Federal tax credits taken for past coal gas drilling activities may be retroactively invalidated. 26 U.S.C. § 29. To producers, the result is the same as "bait and switch" tactics, since these tax incentives were specifically created by Congress to encourage exploration for coalbed methane gas between 1980 and 1992. By relying upon the federal tax incentives and the Solicitor's Opinion, producers now face economic peril.

B. Many Independents Face Severe Losses From Investments In Future Projects That Are No Longer Economically Sound.

Currently, absolutely no mechanism exists for leasing natural gas in coalbeds where the government now allegedly holds title to that gas based upon the court of appeals' decision. Since the decision, the DOI has abstained from participation in this lawsuit and has issued Instruction Memorandum No. 98-28, advising DOI

employees to take no action on lands involving coalbed methane gas. Numerous pending exploration projects are on hold for the foreseeable future because title to the gas through the government's coal ownership cannot be obtained. Although Congress quickly passed the so-called Enzi Act, P.L. No. 105-367, § 1(a), 112 Stat. 3313 (1998), its impact is limited to existing leases. The Enzi Act permits those projects to proceed, not because it resolves *title* to the gas, but because it provides that the government will make no claim for production revenues generated from existing leases. The Act does nothing to prevent other third parties from suing producers, lessors or local governments.

Nor does the Enzi Act resolve the marketable title crisis created by the decision. Many huge areas of the western coal basins have not been leased yet, so the Enzi Act is inapplicable to those lands. They remain closed for the foreseeable future. Only those projects which were about to be drilled and for which a producer had already obtained all necessary leases will benefit from this Act. In many cases, the legislation creates new difficulties because only a fraction of the 100% interest in the gas under a tract of land will be grandfathered in under the Act, resulting in split estates between the government and patent holders. This puts producers in the worst possible situation since the private leases will expire if drilling cannot proceed. If a producer elects to carry the federal interest and go ahead with drilling a well, it may not be able later to obtain the federal interest, or may have to pay enormous sums to obtain it, completely altering the economics of the well. Therefore a real risk exists that the producer would be discovering reserves for

someone else with its investment dollars. This confusion will foster title busting and speculation for years to come, as well as spawning endless litigation pitting neighbor against neighbor and neighbor against the government.

C. The New Scheme Which Gives Coal Owners Rights To The Gas Is Unworkable As A Matter Of Oil And Gas Practice.

The court of appeal's construction of the reservation of "coal" under the Acts is erroneous because it is based upon the misconception that natural gas in coal is somehow coal and not gas for all practical purposes. It is not. Coalbed gas has the same composition as natural gas found in other geologic formations. All natural gas originates from either shales or coals. Over time, much of the gas migrates to surrounding sand and limestone formations where it is trapped with oil and water. Some of the gas remains in the shale or coal. In the case of shale, the gas whether migrated or not, is still considered gas. The same conclusion should apply to gas located in coal.

The artificial distinction drawn by the appellate court, between gas still in the coal seam (deemed coal), and gas originating in the coal seam but which has migrated to adjacent sandstones (deemed natural gas), is unworkable in practice and results in unnecessary expense and waste of recoverable gas. This waste of valuable natural resources contradicts the very purpose of every regulatory scheme devoted to oil and gas

conservation and development.[4] Where drilling activity reveals the presence of gas in both types of formations, duplicative leases from both owners would be required to ensure lawful operations. The drilling of duplicative wells, one to produce gas remaining in the coal and one to produce the gas which has migrated into adjacent geological formations, could also be required. Further, it may be extremely difficult for producers to identify the source of the gas at the surface. This legal fiction creates tremendous hardships for the thousands of producers and mineral owners who relied upon the Solicitor's Opinion. The results oriented decision fashioned here will generate title losses, waste and litigation for many years to come.

CONCLUSION

At stake here is the statutory construction of important public lands statutes affecting ownership of natural gas in coal under more than 20 million acres of western lands. Given the far reaching negative consequences of the court of appeal's decision to property owners, producers, and state and local governments, IPAMS

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[4] *See, e.g.* Wyo. Stat. Ann. § 30-5-102 (1998) (In Wyoming, the waste of oil and gas by inefficient, excessive or improper recovery is expressly prohibited); 43 C.F.R. § 3161.2 (1998) (DOI requires that all oil and gas operations be conducted in a manner which protects natural resources and "results in the maximum ultimate recovery of oil and gas with minimum waste.")

respectfully requests the Court grant a writ of certiorari in this case.

Respectfully submitted,

WILLIAM R. RAPSON
(Counsel of Record)
MARY VIVIANO LAITOS
KEITH D. TOOLEY
WELBORN SULLIVAN MECK &
TOOLEY P.C.
1775 Sherman, Suite 1800
Denver, Colorado 80203
(303) 830-2500

Attorneys for Amicus Curiae,
Independent Petroleum Association
of Mountain States